



1-1-1990

# Extension of Premises Liability for Injuries Resulting from the Criminal Acts of Third Parties on Adjacent Land

Margaret J. Hurley

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

 Part of the [Law Commons](#)

## Recommended Citation

Margaret J. Hurley, Comment, *Extension of Premises Liability for Injuries Resulting from the Criminal Acts of Third Parties on Adjacent Land*, 30 SANTA CLARA L. REV. 977 (1990).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol30/iss4/4>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# EXTENSION OF PREMISES LIABILITY FOR INJURIES RESULTING FROM THE CRIMINAL ACTS OF THIRD PARTIES ON ADJACENT LAND

## I. INTRODUCTION

A man leaves a store in a shopping center after making a purchase late one evening. While approaching his car, he is attacked by a mugger who robs and severely injures him. Could the store owner be liable if the man was assaulted on a portion of the parking lot which the storeowner did not own?<sup>1</sup> If liability was assessed against the store owner in this scenario, he would be held to a duty of care to his customers to prevent injury from criminal acts on adjacent property.<sup>2</sup> This duty of care would in turn be based on the storeowner's actual or apparent right to control the adjoining section of the parking lot.<sup>3</sup>

---

© 1990 by Margaret J. Hurley.

1. There has been a steadily increasing number of cases assessing civil liability on third parties for failing to control or prevent criminal attacks. *See, e.g.*, *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychotherapist's liability for violent acts of patient); *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (landlord's liability for violent acts against tenants); *Dailey v. Los Angeles Unified School Dist.*, 2 Cal. 3d 741, 740 P.2d 360, 87 Cal. Rptr. 376 (1970) (school district's liability for student's violent act); *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (state's liability for parolee's violent act); *Vistica v. Presbyterian Hosp. & Med. Center*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (dicta) (hospital's liability for patient's violent acts).

2. The court, in *Nevarez v. Thriftmart, Inc.*, 7 Cal. App. 3d 799, 803, 87 Cal. Rptr. 50, 53 (1970), had the following to say about the fundamental importance of the duty inquiry:

It is axiomatic that without a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member no negligence can be found. Whether such a duty is owed in a given situation is a question of law for the court to determine.

*Id.* at 803, 87 Cal. Rptr. at 52 (1970).

3. *Nevarez*, 7 Cal. App. 3d at 804, 87 Cal. Rptr. at 53 ("Though the duty of care of the occupier of property arises from his right to control his own premises, such duty may be imposed when he invites intended customers to use, in conjunction therewith, another's property over which his right to control is, perhaps, more apparent than actual.")

The California Supreme Court has stressed the existence of possession and control as a basis for tortious liability for conditions on land.<sup>4</sup> This emphasis on possession and control has been the foundation for the assessment of liability for injuries on the owner's land that are caused by a natural or artificial condition of the land.<sup>5</sup> Possession and control also have been the basis for imposing a duty to protect invitees on an owner's land from injury by third party criminal acts.<sup>6</sup>

However, while "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty"<sup>7</sup> to prevent harm to persons on the landowner's property, historically in California difficulties have existed in the imposition of an affirmative duty on a landowner to prevent harm to persons on *adjacent* land.<sup>8</sup> Because the landowner does not "possess" the adjacent land, the courts often assume he has no right to control it. For example, as recently as 1985, one court stated, "[p]laintiffs have not cited nor are we aware of any case where a landowner was held responsible for injuries to an invitee from criminal activity occurring off the landowner's premises . . . Indeed, it is difficult to perceive how such a rule could be fashioned."<sup>9</sup> As will be shown, what in 1985 seemed to be an unthinkable extension of premises liability could now be looming on the horizon.

This Comment analyzes California courts' recent treatment of the question whether a landowner has a duty to prevent injury to his invitees from criminal acts of third par-

---

4. *Preston v. Goldman*, 42 Cal. 3d 108, 119, 720 P.2d 476, 482, 227 Cal. Rptr. 817, 823 (1986); *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 368, 636 P.2d 1121, 1126, 178 Cal. Rptr. 783, 788 (1981).

5. *Sprecher*, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981).

6. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985). In *Isaacs*, the California Supreme Court held that a landowner could be liable to people injured on his land by the criminal acts of third parties, even without proof of prior similar incidents on the land. *Id.* See also *infra* notes 56-57 and accompanying text.

7. *Sprecher*, 30 Cal. 3d at 370, 636 P.2d at 1127, 178 Cal. Rptr. at 789.

8. "The courts . . . have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management, and control." *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 386, 243 Cal. Rptr. 627, 631 (1988).

9. *Steinmetz v. Stockton City Chamber of Commerce*, 169 Cal. App. 3d 1142, 1146, 214 Cal. Rptr. 405, 407-08 (1985).

ties on adjacent property. Section Two traces the historical definition of "premises" in premises liability, and a more expansive view of the word, proposed in the case of *Schwartz v. Helms Bakery Ltd.*,<sup>10</sup> which has recently been revived<sup>11</sup> after long being restricted to the unique facts of that particular case.<sup>12</sup> Section Three compares two court of appeal decisions, one applying the more traditional concept of premises,<sup>13</sup> and the other borrowing the elastic definition of premises from *Schwartz*,<sup>14</sup> which together highlight the current tension between the two views. Section Four proposes that the California judiciary alleviate this tension by applying the *Schwartz* principle of control more liberally and hinging its application on the existence of certain restrictive factors, so that landowners know what areas of adjacent land for which they are responsible.

## II. BACKGROUND

It has long been held that,

A possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.<sup>15</sup>

Although the wording of this rule contains vestiges of the historical distinction between an invitee, a trespasser and a licensee for the purposes of assessing liability, these status

---

10. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).

11. See *Southland v. Superior Court*, 203 Cal. App. 3d 656, 665 n.6, 250 Cal. Rptr. 57, 61 n.6 (1988).

12. See, e.g., *Steinmetz*, 169 Cal. App. 3d at 1146, 214 Cal. Rptr. at 407-08.

13. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988).

14. *Southland*, 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988).

15. *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 807, 685 P.2d 1193, 1197, 205 Cal. Rptr. 842, 846 (1984) (quoting RESTATEMENT (SECOND) OF TORTS § 344 (1965)).

distinctions were eliminated in *Rowland v. Christian*.<sup>16</sup> *Rowland* held that a landowner has a duty of reasonable care to each person coming upon his land, regardless of that person's status.<sup>17</sup>

It is widely accepted today that "after *Rowland*, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises."<sup>18</sup> Thorny questions arise, however, when the right of possession and the right of control are severed. The fact that neither "possession" nor "control" has a clear and consistent definition complicates the matter.

In discussing the definition of the phrase "owned or controlled" found in California Government Code section 830(c),<sup>19</sup> the court in *Low v. City of Sacramento*<sup>20</sup> stated: "In common law parlance, the possessor of land is the party bearing responsibility for its safe condition. Possession, in turn, is equated with occupancy plus control. Thus, in identifying the party vulnerable to a verdict, control dominates over title. 'The crucial element is control.'"<sup>21</sup>

"Control" is defined as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee."<sup>22</sup> For the purposes of assessing premises liability,

---

16. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

17. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. In replacing the historical distinctions based on the plaintiff's status with the ordinary negligence principles of foreseeable risk and reasonable care, the California Supreme Court stated:

The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

*Id.* However, the plaintiff's status as an invitee continues to be relevant to the question of liability. See *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 808 n.5, 685 P.2d 1193, 1198 n.5, 205 Cal. Rptr. 842, 847 n.5 (1984).

18. *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 368, 636 P.2d 1121, 1126, 178 Cal. Rptr. 783, 788 (1981).

19. CAL. GOV'T CODE § 830(c) (West 1980).

20. 7 Cal. App. 3d 826, 87 Cal. Rptr. 173 (1970).

21. *Id.* at 831, 87 Cal. Rptr. at 175 (quoting *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 239, 430 P.2d 68, 73, 60 Cal. Rptr. 510, 515 (1967)).

22. BLACK'S LAW DICTIONARY 298 (5th ed. 1979).

ty, control is equated with the power to remedy a hazardous condition.<sup>23</sup> "(I)n identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid."<sup>24</sup> Thus, one can possess land without having control over it for the purposes of premises liability,<sup>25</sup> and, more importantly for the proposition of this Comment, can control land without possessing it.

*A. Early Cases Recognized The Duty Of Care To Invitees Extends To Adjacent Areas Within Owner's Control*

It has long been the rule that a landowner can be held liable for injuries on land adjacent to his own in certain limited circumstances.<sup>26</sup> The court in *Johnston v. De La Guerra Properties, Inc.*<sup>27</sup> cited the premise that "an invitor owes a duty to business invitees to use reasonable care as to all portions of the premises over which he has control, whether they be within the precincts of the building or on the outside and used by the general public in common with invitees."<sup>28</sup> The *Johnston* court applied this rule to reserve the grant of a nonsuit<sup>29</sup> against the plaintiff. The court held that both the owner and tenant of a building could be liable to a patron who was injured on a private adjacent walkway used as an entrance to the tenant's restaurant. The fact that the owner and tenant encouraged restaurant customers to park their cars on the adjoining property and use the private

---

23. *Low v. City of Sacramento*, 7 Cal. App. 3d 826, 832, 87 Cal. Rptr. 173, 176 (1970).

24. *Id.* See also *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 727, 246 Cal. Rptr. 199, 206 (1988) (Wiener, J., dissenting).

25. For example, a tenant often does not have the right to correct lighting problems in common areas of an apartment complex; rather, this would be the landlord's role. The court in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), reasoned that the landlord has a duty to protect his tenants because he is the only one who has control of the areas of common use and common danger in a large apartment complex, and only he has "the power to make the necessary repairs or to provide the necessary protection." *Id.* at 481.

26. *Steinmetz v. Stockton City Chamber of Commerce*, 169 Cal. App. 3d 1142, 1146, 214 Cal. Rptr. 405, 407-08 (1985).

27. 28 Cal. 2d 394, 170 P.2d 5 (1946).

28. *Id.* at 400, 170 P.2d at 8.

29. A nonsuit is a judgment granted against a plaintiff who fails to proceed to trial or is unable to prove his case. BLACK'S LAW DICTIONARY 954 (5th ed. 1979).

walk to approach the building, and controlled the means of lighting the walkway, was sufficient evidence to bring the case before a jury.<sup>30</sup>

As the *Johnston* decision demonstrates, a court will not hold an adjacent landowner liable simply because he is an adjacent landowner. Some measure of control over the situs of the injury must exist before liability will be assessed.<sup>31</sup> One such measure of control is the landowner's use of adjacent land for his own commercial purposes.<sup>32</sup> In the case of *Kopfinger v. Grand Central Public Market*,<sup>33</sup> the court reversed a nonsuit in favor of the defendant market, holding that a jury could find the market liable for injuries sustained by a customer who slipped on a piece of gristle that had dropped from the defendant's market onto an adjacent public sidewalk.<sup>34</sup> Later cases have established that this "commercial benefit" rule only applies when the landowner has the power to correct the injury-producing condition of the adjacent land,<sup>35</sup> or has caused the dangerous condition and failed to warn customers of it.<sup>36</sup>

---

30. *Johnston*, 28 Cal. 2d at 397, 170 P.2d at 7. Significant to the court's assessment of liability in this case was the fact that at one time the tenant had arranged for the restaurant's patrons to park in the lot without charge, and people doing so would use the private walkway in question to enter the restaurant. "At the time of plaintiff's injuries, these parking arrangements had been terminated, but, to the knowledge of both defendants, many patrons continued to park on the adjoining property and to approach the . . . establishment from that direction." *Id.* at 397, 170 P.2d at 7.

31. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988). "The law of premises liability does not extend so far as to hold Cal Western liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect the condition of such adjoining property." *Id.* at 720, 246 Cal. Rptr. at 201.

32. *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1988).

33. 60 Cal. 2d 852, 389 P.2d 529, 37 Cal. Rptr. 65 (1964).

34. "There was evidence which, if believed, established that: as a result of the manner of operation of Melton's stall and the market, some meat products fell to the ground in the course of Melton's activities . . ." *Id.* at 856, 389 P.2d at 531, 37 Cal. Rptr. at 67.

35. See, e.g., *Owens*, 198 Cal. App. 3d at 385, 243 Cal. Rptr. at 630.

36. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 246 Cal. Rptr. 199, 202 (1988). The *Donnell* court stressed that *Kopfinger* was based on the fact that the defendant's business activities affirmatively created a dangerous condition on the adjacent public sidewalk which the defendant did not timely remedy. *Id.* See also *Ross v. Kirby*, 251 Cal. App. 2d 267, 59 Cal. Rptr. 601 (1967).

B. *The Schwartz Decision and Its Elastic Concept of Premises*

The most far-reaching assessment of liability based on control of the dangerous condition and the power to remedy it came in *Schwartz v. Helms Bakery Ltd.*<sup>37</sup> In *Schwartz*, a four-year-old boy approached a street vendor to buy a doughnut. The vendor agreed to meet the boy "up the street" after the child obtained some money from his home. After waiting for the boy at the rendezvous point, the vendor started on his way and the plaintiff, trying to intercept the vendor, ran from behind a parked car into the path of an oncoming vehicle.<sup>38</sup>

In overruling a nonsuit in favor of the defendant, the court held that by directing the plaintiff to an assigned meeting point, the defendant established a special relationship with the plaintiff, thereby assuming a duty to exercise due care for his safety.<sup>39</sup> The court held a jury could find that because the vendor knew where the boy lived, and knew that his directions compelled the child to cross the street against foreseeably heavy traffic on a winter evening, the vendor negligently discharged his duty of care by failing to stop traffic for the plaintiff.<sup>40</sup> In addition, the court found that a second special relationship was forged between the defendant vendor and the plaintiff when he invited the plaintiff to become a customer of his business.<sup>41</sup> As an invitor, the ven-

---

37. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967). For an excellent critique of the *Schwartz* decision, see Comment, *The Supreme Court of California*, 56 CALIF. L. REV. 1612, 1769-75 (1968).

38. *Schwartz*, 67 Cal. 2d at 235-36, 430 P.2d at 70-71, 60 Cal. Rptr. at 512-13. The plaintiff filed a dismissal with prejudice as to the driver of the car, and thus the question of her liability was not before the court. *Id.* at 235 n.1, 430 P.2d at 70 n.1, 60 Cal. Rptr. at 512 n.1.

39. *Id.* at 242, 430 P.2d at 75, 60 Cal. Rptr. at 517. The *Schwartz* case also involves the issue of proximate cause and the degree of care required when dealing with young children, but these issues stray from the proposition of this Comment.

40. The court further pointed out that the vendor had *actual* knowledge of the plaintiff's carelessness in traffic, which pushed the vendor's standard of care for the plaintiff even higher than that due to a stranger. *Schwartz*, 67 Cal. 2d at 243, 430 P.2d at 75-76, 60 Cal. Rptr. at 517-18.

41. *Id.* at 236, 430 P.2d at 70, 60 Cal. Rptr. at 512. The court's finding of a proprietor-invitee relationship thus raised the long-established duty of a proprietor to exercise reasonable care for the welfare of his business invitees. See, e.g., *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 807, 685 P.2d



dor could be held to the duty of exercising reasonable care for the child's safety in the immediate vicinity of the truck.<sup>42</sup> Thus, a jury could find that the vendor should have supervised the plaintiff during his trip to and from his house.<sup>43</sup>

The key portion of the *Schwartz* decision is the court's analysis of the meaning of "premises." After first stating the general rule that one who invites another to transact business with him owes to the invitee a duty to prevent injury to him,<sup>44</sup> the court stated:

The physical area encompassed by the term "the premises" does not, however, coincide with the area to which the invitor possesses a title or a lease. The "premises" may be less or greater than the invitor's property. The premises may include such means of ingress and egress as a customer may reasonably be expected to use. The crucial element is control.<sup>45</sup>

In a later footnote the court described the limits to this extension of the "premises" definition:

The authorities we have cited above show that the concept of "business premises" may no longer be mechanically defined by the geographical area in which the invitor holds a property interest. An invitor may be liable for an injury, whether it occurs on his property or on a common passageway or on an adjacent sidewalk or street being used for his special benefit, if, and only if, the injury is caused by a dangerous condition, or unreasonable risk of harm, within the invitor's control.<sup>46</sup>

---

1193, 1197, 205 Cal. Rptr. 842, 846 (1984).

42. *Schwartz*, 67 Cal. 2d at 242-43, 430 P.2d at 75, 60 Cal. Rptr. at 517. The court held that the public streets and sidewalks were included as part of the vendor's business premises because they had become an integral part of the vendor's business activities. *Id.* at 243 n.10, 430 P.2d at 75 n.10, 60 Cal. Rptr. at 517 n.10.

43. *Id.* at 242, 430 P.2d at 75, 60 Cal. Rptr. at 517. *See also supra* note 40 and accompanying text.

44. *See supra* note 15 and accompanying text.

45. *Schwartz*, 67 Cal. 2d at 239, 430 P.2d at 72-73, 60 Cal. Rptr. at 514-15. This formulation will hereafter be referred to as the *Schwartz* definition of premises.

46. *Schwartz*, 67 Cal. 2d at 243 n.10, 430 P.2d at 75 n.10, 60 Cal. Rptr. at 517 n.10.

Thus, the *Schwartz* court chose to apply the general common law principles of landowner liability to this street vendor,<sup>47</sup> even though he owned no land in the area, because he undertook to control the child's actions and could have stopped the traffic while the boy crossed the street.<sup>48</sup>

### C. *The Impact of the Schwartz Definition of "Premises"*

Many recent courts have limited the elastic *Schwartz* definition of premises to the facts of that case.<sup>49</sup> In *Nevarez v. Thriftmart, Inc.*,<sup>50</sup> the court considered the liability of a grocery store for injuries sustained by the three-year-old plaintiff<sup>51</sup> when, attracted to a grand-opening carnival in the store's parking lot, he ran into a public street and was struck by an automobile driven by a third party. The *Nevarez* court stated that the foundation for the *Schwartz* decision, that the vendor undertook a special relationship with the child by inviting him to do business with the vendor at a certain place, was unrelated to the case before it and "founded upon distinctions not here present."<sup>52</sup> Viewing *Schwartz* as a unique decision, the court reasoned that the *Schwartz* holding

---

47. The *Schwartz* court first characterized the vendor-child relationship as a proprietor-invitee relationship historically recognized at common law, and then specifically stated that it was creating no new duty but merely recognizing the common law duty arising from the relationship between the parties. *Id.* at 239 n.4, 430 P.2d 68, 72 n.4, 60 Cal. Rptr. 510, 514 n.4.

48. *Id.* at 243, 430 P.2d at 75, 60 Cal. Rptr. at 517. It is interesting to note that many later courts failed to recognize that the *Schwartz* holding was in part based on the street vendor's ability to "[halt] the automobiles to enable the child to cross safely," *id.*, and thus control the traffic around him. See, e.g., *Nevarez v. Thriftmart, Inc.*, 7 Cal. App. 3d 799, 805, 87 Cal. Rptr. 50, 54 (1970) ("While the street vendor cannot control traffic on the street around him he can, to a degree, control his own movements, the places where he will do business, and, thus, the avenues of approach to it.").

49. See, e.g., *Nevarez*, 7 Cal. App. 3d at 805, 87 Cal. Rptr. at 54. But see, *Low v. City of Sacramento*, 7 Cal. App. 3d 826, 831, 87 Cal. Rptr. 173, 175 (1970) (borrowing the *Schwartz* distinction between control and title).

50. 7 Cal. App. 3d 799, 87 Cal. Rptr. 50 (1970).

51. The plaintiff's action was brought by his guardian ad litem on his behalf. *Id.* at 799.

52. *Id.* at 805, 87 Cal. Rptr. at 54. The *Nevarez* court saw the foundation for the *Schwartz* decision as finding that the vendor undertook a special relationship with the child by inviting him to do business with the vendor at a certain place: "[T]he street vendor is present in the street with his truck; he invites people to do business with him at his truck and in that part of the public street around him; patrons are attracted from predictable groups and locations, arriving along reasonably predictable routes of approach." *Id.*

was grounded in the vendor's power to choose the area where he did business and, thus, the avenues of approach to that area.<sup>53</sup> The court stressed that the grocery store could not control the surrounding public streets and could not control the unlimited routes of approach which children might take to reach the store.<sup>54</sup> To support this point, the court reasoned that if liability were to be assessed in such a case, "[r]etail establishments would be cast in the role of a modern-day Pied Piper and, as such, obligated to act as parent or babysitter for every tot in the neighborhood who might decide to dash across a public street in order to bask in the store's allure."<sup>55</sup>

Litigants have attempted to extend the use of the *Schwartz* definition of premises to civil suits arising out of injuries from criminal attacks. In *Isaacs v. Huntington Memorial Hospital*,<sup>56</sup> the California Supreme Court established that a landowner could be held liable to people injured on his premises by the criminal acts of third parties even though there had been no similar incidents of criminal activity on his land in the past.<sup>57</sup> Not surprisingly, a series of cases followed attempting to extend such landowner liability to injuries occurring on adjacent land.

In *Steinmetz v. Stockton City Chamber of Commerce*,<sup>58</sup> the plaintiffs' decedent was murdered after attending a social mixer sponsored by the defendant Chamber of Commerce ["Chamber"]. On the night of the murder, the mixer was

---

53. *Id.*

54. *Nevarez*, 7 Cal. App. 3d at 805-06, 87 Cal. Rptr. at 53-54. In contrast to roving street vendors, the court reasoned, the defendant had no way of knowing which routes children would use to attend the carnival. *Id.* at 806, 87 Cal. Rptr. at 54.

55. *Id.*

56. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

57. *Id.* at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362. Before the *Isaacs* decision, several appellate court decisions had adopted the rule that "in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons, particularly where the wrongdoer was a complete stranger to both the landowner and the victim and where the criminal activity leading to the injury came precipitously." *Wingard v. Safeway Stores, Inc.*, 123 Cal. App. 3d 37, 43, 176 Cal. Rptr. 320, 324 (1981). In *Isaacs*, however, the California Supreme Court criticized the "prior incidents rule" and adopted, in the alternative, the much broader test of foreseeability. The court advised that "[p]rior similar incidents are helpful to determine foreseeability but they are not necessary." *Isaacs*, 38 Cal. 3d at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362.

58. 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 (1985).

hosted by the defendant California Human Development Corporation ["CHDC"] at its offices in an industrial park. Because CHDC had only 20-25 parking spaces within its premises, the party-goers parked in other businesses' parking areas within the industrial park. When returning to her car parked in a section of the lot about one block away from CHDC premises, but still within the industrial park, the decedent was killed. The plaintiffs for the decedent alleged the defendants breached their duty to the decedent as their business invitee in failing to provide a safe place to park because the inadequate lighting and lack of security guards in the industrial park's lot contributed to her death.<sup>59</sup>

In upholding a grant of summary judgment in favor of both defendants, the court of appeals discussed the *Schwartz* definition of premises but distinguished it, stating:

This elastic concept of business premises is uniquely appropriate to the vendor whose commercial activities are conducted from a mobile vehicle at shifting locations on the public streets. However, we know of no decision which has applied this standard to one whose business is conducted on private property in a fixed location. Indeed, it is difficult to perceive how such a rule could be fashioned.<sup>60</sup>

Because, as the court pointed out, the duty to protect individuals is always grounded on the right to control and manage the premises,<sup>61</sup> the court easily determined that on the facts before it the plaintiffs had not established the existence of a duty of care: "[t]he decedent was murdered off the premises leased by CHDC on property not within the possession or control of CHDC or Chamber, but rather on the premises of another tenant in the industrial park."<sup>62</sup> Moreover, neither defendant had the right to station security guards, install lighting, or control the conduct of invitees or third parties on the other sections of the industrial park lot outside of

---

59. *Id.* at 1144, 214 Cal. Rptr. at 406.

60. *Id.* at 1146, 214 Cal. Rptr. at 408.

61. *Id.* (quoting *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 368, 636 P.2d 1121, 1126, 178 Cal. Rptr. 783, 788 (1981)).

62. *Steinmetz*, 169 Cal. App. 3d at 1146, 214 Cal. Rptr. at 407.

CHDC's.<sup>63</sup> Thus, the court determined that neither defendant owed the decedent a duty of care.

The court in *Owens v. Kings Supermarket*<sup>64</sup> joined with the *Nevarez* and *Steinmetz* courts in limiting the *Schwartz* definition of premises to the unique facts of the *Schwartz* case. In *Owens*, the plaintiff double-parked his car on a public street in front of the defendant supermarket. He was injured when another car rolled forward and crushed his legs while he was exiting his car.<sup>65</sup> After two demurrers were sustained against his original and first amended complaints, the plaintiff finally alleged that the accident occurred on the supermarket "premises."<sup>66</sup> However, because the plaintiff did not explain the sudden change in the alleged location of the accident, the court assumed the plaintiff was injured on a public street adjacent to the defendant's property, as had been alleged in the previous two complaints.<sup>67</sup>

---

63. *Id.* at 1147, 214 Cal. Rptr. at 408. In an oft-quoted passage the court described the ominous consequences of extending a landowner's duty to land not owned or controlled by him. "The instant case cannot be distinguished from that of a movie theater showing the latest Academy Award winning movie, or a department store holding its annual clearance sale, neither of which is able to afford sufficient parking for the number of invitees seeking to enter the premises." *Id.*

64. 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (1988).

65. *Id.* at 381-82, 243 Cal. Rptr. at 628.

66. In the plaintiff's original complaint, he alleged that the defendant supermarket used the roadway adjacent to its premises, where plaintiff was injured, as a parking lot for its customers. The defendant's demurrer to this complaint was sustained with leave to amend, on the ground that the defendant had no power to control the public street. *Id.* at 382, 243 Cal. Rptr. at 629. The first amended complaint added a new paragraph alleging the sidewalk and adjacent roadway were used for the commercial benefit of the defendant for deliveries and customer parking, and that this commercial use created a hazardous condition which caused his injuries. In support of its second demurrer, the defendant argued that it had no duty to persons injured off its premises by an alleged dangerous condition of an adjacent public street. The court also sustained this demurrer with leave to amend. *Id.* at 382-83, 243 Cal. Rptr. at 629. Finally in his second amended complaint the plaintiff alleged he was on the defendant's premises when he was injured. *Id.*

67. *Owens*, 198 Cal. App. 3d at 383-84, 243 Cal. Rptr. at 630. The court based its assumption on the rule that:

where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings, the policy against sham pleadings permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.

The court rejected the plaintiff's two theories of liability on the basis that the supermarket could not control nor manage the public street adjacent to its entrance.<sup>68</sup> The court reasoned:

Thus, although it is indisputable that the scope of premises liability has been greatly expanded in the last 10 years, plaintiff is attempting to extend the duty beyond the premises and into an undefined zone of "commercial use." The imposition of such a duty is foreign to the concept upon which all premises liability is based, i.e., that possession includes the attendant right to manage and control, thereby justifying the imposition of a duty to exercise due care in the management of the property.<sup>69</sup>

*Schwartz* was cited as a "very narrow exception to the general rule that a person has no duty to exercise ordinary care to render safe property over which he or she has no right of possession or control."<sup>70</sup> However, relying on the *Steinmetz* and *Nevarez* decisions, the court declined to extend the duty recognized in *Schwartz* to a commercial enterprise operating out of a fixed location.<sup>71</sup>

The reluctance to extend the *Schwartz* definition of premises has not been limited to courts faced with commercial defendants. In *Donnell v. California Western School of Law*,<sup>72</sup>

---

*Id.* [Citations omitted].

68. *Id.* at 385, 243 Cal. Rptr. at 630-31. After asserting the accident took place on the defendant's premises, the plaintiff utilized the traditional arguments for the imposition of landowner liability. The plaintiff first relied on the *Sprecher* principle that a landowner has the duty to exercise ordinary care to prevent injuries to persons on adjacent property caused by a natural or artificial condition of the owner's property. Second, the plaintiff invoked the *Isaacs* rule that a landowner is liable to an invitee for foreseeable injuries caused by the harmful acts of third parties. *Id.*

69. *Id.* at 386, 243 Cal. Rptr. at 631. "The courts, therefore, have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control." *Owens*, 198 Cal. App. 3d at 386, 243 Cal. Rptr. at 631.

70. *Id.* at 387, 243 Cal. Rptr. at 632. As has been noted, this characterization of *Schwartz* as an exception to the general rule is not entirely correct. See *supra* note 48 and accompanying text.

71. See *supra* notes 50-55, 58-63 and accompanying text.

72. 200 Cal. App. 3d 715, 246 Cal. Rptr. 199 (1988). In *Donnell*, a law student left the law library at approximately 10:30 p.m. and, while walking to the parking lot, noticed a man trying to break into someone else's car. The assailant chased him when the student tried to intervene, and stabbed him while he was

the court refused to hold the defendant law school liable to the plaintiff for a criminal assault on a poorly lit public sidewalk immediately adjacent to the law school. The court first noted that the plaintiff's heavy reliance on *Schwartz* was "misplaced" because even in *Schwartz* the premises definition was based on control of the property,<sup>73</sup> and no evidence existed of the law school's right of control over the public sidewalk. The court then dismissed the plaintiff's argument that by placing lights on its building the school could have illuminated the area and reduced the probability of such an attack: "The mere possibility of influencing or affecting the condition of the property owned or possessed by others does not constitute 'control' of such property."<sup>74</sup> The *Donnell* decision, thus, soundly rejects the *Schwartz* elastic definition of premises by stating that the "language in *Schwartz* did not expand the law of premises liability beyond those premises owned, possessed or controlled by the defendant."<sup>75</sup>

The application of *Schwartz* remained limited, until the recent case of *Southland v. Superior Court*.<sup>76</sup> In *Southland*, the petitioners, Southland Corporation and Jan Lee, Inc., sought writ relief compelling the respondent Superior Court to grant their motion for summary judgment.<sup>77</sup> The real party in interest, Spencer (the plaintiff in the underlying action), had parked his car on a vacant lot immediately adjacent to the parking lot provided for a 7-Eleven store owned by Southland Corporation. He was attacked while returning to his car after making a purchase at the store, at a spot approximately ten feet beyond the boundary of the property leased to the store.<sup>78</sup> His assailants, described as dressed

---

on a public sidewalk. *Id.* at 718, 246 Cal. Rptr. at 200.

73. *Id.* at 722-23, 246 Cal. Rptr. at 203. This control in *Schwartz* was, among other things, the vendor's ability to halt traffic around him to allow the boy to move safely into the street. See *supra* note 48 and accompanying text.

74. *Id.* at 725-26, 246 Cal. Rptr. at 205.

75. *Id.* at 722, 246 Cal. Rptr. at 203. The *Donnell* court further explained that "such language was merely part of the [*Schwartz*] court's summary of the earlier cases involving premises liability." *Id.*

76. 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988).

77. *Id.* at 662, 250 Cal. Rptr. at 59. The petitioners brought a writ of mandate, which is "[a] precept or order issued upon the decision of an appeal or writ of error, directing action be taken, or disposition to be made of a case, by [the] inferior court." BLACK'S LAW DICTIONARY 867 (5th ed. 1979).

78. Spencer settled his action against the owner of the vacant lot. *Southland v. Superior Ct.*, 203 Cal. App. 3d 656, 662 n.4, 250 Cal. Rptr. 57, 59 n.4 (1988).

like a "punk rock trio," approached him from behind, which was from the direction of the 7-Eleven.<sup>79</sup> Spencer filed a complaint for negligence against Southland, as franchisor of the 7-Eleven, and Lee, as franchisee of the store, among others.<sup>80</sup>

The fact pattern of *Southland* seems very susceptible to the *Steinmetz* court's narrow reading of the *Schwartz* decision.<sup>81</sup> However, after noting that previous decisions had limited the *Schwartz* holding to the unique facts of that case,<sup>82</sup> the *Southland* court explained, "... what is significant about *Schwartz*, in the context of this case, is its elastic concept of control. The opinion emphasizes that the critical issue is control but recognizes that the exercise of control is not necessarily confined to those premises which are owned or possessed by the defendant."<sup>83</sup> The court distinguished the line of cases (*Steinmetz*, *Nevarez*, *Owens*, and *Donnell*) where "it was clear that the defendant did not and could not exercise control over the property where plaintiff sustained injury,"<sup>84</sup> and upheld the denial of summary judgment for the petitioners on the basis that they had the "power" to control the adjacent lot.<sup>85</sup> Revitalizing the *Low* court's view of "control,"<sup>86</sup> the court reasoned, "it is overly simplistic for the issue of control to be resolved solely by reference to a property boundary line and the fortuitous circumstances that the attack on [the plaintiff] took place just ten feet beyond it."<sup>87</sup>

The very argument the *Donnell* court rejected, that a landowner's possibility of affecting the condition of adjacent

---

79. *Id.* at 660, 250 Cal. Rptr. at 58.

80. *Id.* at 662, 250 Cal. Rptr. at 59. The defendant Southland leased the premises from an entity not a party to the action and subleased them to the defendant Lee, its franchisee. *Id.* at 662 n.3, 250 Cal. Rptr. at 59 n.3.

81. *Steinmetz v. Stockton City Chamber of Commerce*, 169 Cal. App. 3d 1142, 1146, 214 Cal. Rptr. 405, 408 (1985) (stating that no decision had as yet applied the *Schwartz* definition of premises to one whose business was conducted on private property in a fixed location).

82. *Southland*, 203 Cal. App. 3d at 665 n.6, 250 Cal. Rptr. at 61 n.6.

83. *Id.*

84. *Id.* at 665-66, 250 Cal. Rptr. at 62.

85. *Id.* at 666, 250 Cal. Rptr. at 62.

86. *Low v. City of Sacramento*, 7 Cal. App. 3d 826, 831, 87 Cal. Rptr. 173, 175 (1970), where the court reasoned that "in identifying the party vulnerable to a verdict, control dominates over title." See also *supra* notes 20-24 and accompanying text.

87. *Southland*, 203 Cal. App. 3d at 667, 250 Cal. Rptr. at 63.



property was sufficient to show "control" over it,<sup>88</sup> was rephrased in *Southland* as the "power to control"<sup>89</sup> and accepted as sufficient to raise a triable issue of fact over the defendant's control of the adjacent lot. Can this difference be passed off as merely reflecting the different fact patterns of the two cases? A more detailed analysis of *Donnell* and *Southland* is necessary to answer this question.

### III. *DONNELL* AND *SOUTHLAND* — IS THE "ABILITY TO CONTROL" A SUFFICIENT BASIS FOR LIABILITY?

The facts of the *Donnell* and *Southland* decisions are surprisingly similar, given the opposite results the two courts reach. Noteworthy is that in both decisions, the court was reviewing the order on a summary judgment motion at the trial court level. While not a final assessment of liability, a court's decision at the summary judgment stage can significantly affect settlement negotiations between the parties.<sup>90</sup> In addition, an order of summary judgment in favor of the defendant takes the case from a jury, thereby usurping the jury's role of determining both what happened and whether the defendant exercised ordinary care in his actions.<sup>91</sup>

In both *Donnell* and *Southland* the plaintiff was injured by a third party while returning to his car from the defendant's establishment.<sup>92</sup> The allegations of the defendant's lia-

---

88. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 725-26, 246 Cal. Rptr. 199, 205 (1988).

89. *Southland*, 203 Cal. App. 3d at 664, 250 Cal. Rptr. at 61.

90. Subsequent to the court's reversal of a summary judgment order in favor of the defendant in *Gomez v. Ticor*, 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983), the defendant, Ticor, paid \$150,000 in settlement. Similarly, after the court overruled a summary judgment order in the defendant's favor in *Cohen v. Southland Corp.*, 157 Cal. App. 3d 130, 203 Cal. Rptr. 572 (1984), the plaintiff entered into a structured settlement with the defendants for an undisclosed amount. Cabrera, *Negligence Liability of Landowners and Occupiers for the Criminal Conduct of Another: On a Clear Day in California One Can Foresee Forever*, 23 CAL. W.L. REV. 165, 182 n.100, 183 n.104 (1987).

91. One commentator explains: "Under the broadly defined negligence standard, the jury is needed not only to determine what conduct actually occurred, but to *characterize* that conduct according to the 'ordinary care' test. Thus, the jury will generally be needed even when the facts are not materially disputed." Leonard, *The Good Samaritan Rule as a Procedural Control Device: Is It Worth Saving?*, 19 U.C. DAVIS L. REV. 807, 816 (1986).

92. *Donnell*, 200 Cal. App. 3d at 718, 246 Cal. Rptr. at 200; *Southland*, 203

bility were identical: both plaintiffs alleged that the defendant failed to provide adequate parking for their invitees.<sup>93</sup> Both also alleged that, considering the defendant's knowledge of criminal activity in the area, the defendant was negligent in not installing sufficient security measures to prevent their injuries.<sup>94</sup> However, one crucial distinction exists in the facts of the cases: the attack in *Donnell* occurred on a public sidewalk,<sup>95</sup> whereas the assault in *Southland* happened on a privately-owned, vacant lot which the defendants had a non-exclusive leasehold right to use for customer parking.<sup>96</sup> While the *Southland* court had no trouble distinguishing *Donnell* based on its factual distinction,<sup>97</sup> the public nature of the situs of the injury in *Donnell* did not justify the *Donnell* court's decision.

A. *The Donnell Decision Unduly Restricts The Scope Of The Law School's Premises*

Because adult students are generally considered business invitees,<sup>98</sup> the *Donnell* court recognized that the proper analysis under the facts of the case was whether the defendant law school, a proprietor, had a duty to prevent this injury to the plaintiff, a business invitee.<sup>99</sup> However, instead of utilizing the policy factors enunciated in *Rowland* to determine whether a duty existed, the court seized on the *Isaacs* state-

---

Cal. App. 3d at 660, 250 Cal. Rptr. at 58.

93. *Donnell*, 200 Cal. App. 3d at 718, 246 Cal. Rptr. at 200; *Southland*, 203 Cal. App. 3d at 661, 250 Cal. Rptr. at 59.

94. *Donnell*, 200 Cal. App. 3d at 718, 246 Cal. Rptr. at 200; *Southland*, 203 Cal. App. 3d at 664-65, 250 Cal. Rptr. at 61.

95. *Donnell*, 200 Cal. App. 3d at 718, 246 Cal. Rptr. at 200. At the trial level, *Donnell* had presented evidence that the assailant chased him and eventually slashed at him while his back was against a garbage dumpster at the Northwest corner of Cal Western's law school building. However, this point was not raised in the appellate brief as a basis for liability, and the appellate court dismissed it in a footnote. See *id.* at 718 n.1, 246 Cal. Rptr. at 200 n.1.

96. *Southland*, 203 Cal. App. 3d at 661, 250 Cal. Rptr. at 58. "Petitioners, under the master lease, had a non-exclusive right to use two portions of the vacant lot for the ingress and egress of their employees and customers and apparently also had a non-exclusive right to use the adjacent lot for extra parking." *Id.* at 661 n.1, 250 Cal. Rptr. at 58 n.1 (emphasis original).

97. *Id.* at 667, 250 Cal. Rptr. at 63.

98. *Donnell*, 200 Cal. App. 3d at 719, 246 Cal. Rptr. at 201 ("Mature students are generally considered business invitees.").

99. *Id.* at 720, 246 Cal. Rptr. at 201. See also *supra* note 15 and accompanying text.

ment that "[a] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control. Where the absence of ownership, possession or control has been unequivocally established, summary judgment is proper."<sup>100</sup> Because the law school's lack of ownership and possession of the city-owned sidewalk was automatically established, only the element of "control" had to be eliminated for the court to properly enter summary judgment for the defendant based on *Isaacs*.<sup>101</sup> The court did this by adopting a restrictive definition of control and ignoring the application of the *Rowland* policy considerations to the facts of the case.<sup>102</sup>

The fact that the attack in *Donnell* occurred on a public sidewalk made a comparison to the *Steinmetz* decision<sup>103</sup> inevitable. The *Donnell* court believed that both cases involved an injury on land over which the defendant had no right of control.<sup>104</sup> However, whereas in *Steinmetz* the location of the attack was far from the defendant's premises, thus precluding the defendant's ability to affect the situs of the injury,<sup>105</sup> in *Donnell*, the attack occurred at the west side of the defendant's building.<sup>106</sup> This gave the plaintiff a strong argument that the defendant, knowing of prior criminal attacks in this locality, should have placed lights on its building to shine over the sidewalk, or mounted exterior monitors on its

---

100. *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 134, 695 P.2d 653, 664, 211 Cal. Rptr. 356, 367 (1985).

101. *Id.*

102. See *infra* notes 103-10, 126-36 and accompanying text.

103. *Steinmetz v. Stockton City Chamber of Commerce*, 169 Cal. App. 3d 1142, 214 Cal. Rptr. 405 (1985).

104. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 725, 246 Cal. Rptr. 199, 205 (1988). The court stated: "Here Donnell has presented no evidence Cal Western had any right to control or manage the city-owned sidewalk." *Id.*

105. *Steinmetz*, 169 Cal. App. 3d at 1147, 214 Cal. Rptr. at 409. The court emphasized:

CHDC had no right to station security guards on premises it neither owned nor controlled. Nor did CHDC have any right to place lighting in any parking area other than its own parking area. Moreover, neither CHDC nor Chamber had any right to control the activities of either the invitees or third parties where those activities occur off premises which they neither own, possess, nor control.

*Id.*

106. *Donnell*, 200 Cal. App. 3d at 717, 246 Cal. Rptr. at 200.

building, so that students could view the area before crossing.<sup>107</sup>

The court rejected the plaintiff's argument that the defendant's failure to install these safety measures proximately caused his injuries.<sup>108</sup> The weakness of the court's reasoning surfaces more readily in a similar statement later in the case:

Unlike the plaintiff in *Johnston*, Donnell presented no evidence Cal Western had any right to control the city-owned sidewalk where Donnell was assertedly injured. At most, Cal Western merely had the ability to influence or affect the condition of the city's property. Further, Donnell presented no evidence Cal Western assumed any responsibility for or exercised control over the means of lighting the city-owned sidewalk where Donnell was injured.<sup>109</sup>

The court's reasoning is not consistent with the factual evidence and allegations of liability Donnell presented. The proof of "control" needed to support liability is proof of the power to correct the dangerous condition of land.<sup>110</sup> The dangerous condition of the sidewalk where Donnell was assaulted was its darkness. Cal Western had the *ability* to dispel this darkness by installing lights on its building. Cal Western had the *right* to control the sidewalk in this way because it had the right to install anything it wanted on a building it owned.<sup>111</sup>

In view of this showing of control over the adjacent sidewalk, the court could only assert that "[d]epending on location, building configurations and technology, Cal Western may have the potential to influence or affect the condition of

---

107. *Id.* at 720, 246 Cal. Rptr. at 201.

108. *Id.* As its basis for this rejection, the court explained: "Donnell attempts to expand the principle of 'control' of property to include situations where an adjoining landowner merely has the ability to influence or affect such property." *Id.*

109. *Id.* at 722, 246 Cal. Rptr. at 203.

110. See *Donnell*, 200 Cal. App. 3d at 727 n.1, 246 Cal. Rptr. at 206 n.1 (Weiner, J., dissenting) ("Control" means '[t]o exercise authority or dominating influence over; direct; regulate.' (THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 290 (New College ed. 1981)) 'Influence' is '[t]o have power over; affect.' (*Id.* at 674)).

111. *Id.* at 728, 246 Cal. Rptr. at 207 (Weiner, J., dissenting). In fact, the law school did install such lighting shortly after the assault on Donnell. *Id.*

adjoining property or property at various distances from its own property."<sup>112</sup> This argument has surface appeal because of the fear of subjecting an entity to potentially unlimited liability. However, this fear exists in every negligence case. For example, if Donnell had been assaulted within Cal Western's property lines, Cal Western may have been held liable for not illuminating and having security guards patrol the area.<sup>113</sup> The question would then be to what degree of care should Cal Western be held, e.g., should it have had a security guard patrol every hour, or every half hour? Cal Western would be held to the standard of care a reasonable entity would exercise in the same circumstances. Similarly, even if Cal Western had the technology to illuminate the sidewalk a block away, it would only reasonably be expected that the school would illuminate the immediate vicinity. As the dissenting judge put it:

[W]e could not expect Cal Western to fix the sidewalk adjacent to buildings two blocks away from the law school entrance even though students routinely use those sidewalks. 'Control' in that situation is nothing more than a conclusionary way of saying that we do not impose impossible burdens on people.<sup>114</sup>

This limitation was also in the minds of the members of the *Schwartz* court when they originally formulated their flexible definition of premises:

Obviously, defendants are not insurers for all accidents occurring in areas through which their truck passes. They may not be held liable, for example, for a fall caused by an unobserved defect in a sidewalk next to which their truck stops. They may be responsible, however, for harm occurring in the immediate vicinity of the truck, wherever it may be stopped at a given time, if the harm is of a kind that defendants could have prevented by exercising reasonable care for the safety of their customers.<sup>115</sup>

---

112. *Id.* at 725, 246 Cal. Rptr. at 205.

113. See *supra* note 48 and accompanying text.

114. *Donnell*, 200 Cal. App. 3d at 728, 246 Cal. Rptr. at 206-07 (Weiner, J., dissenting).

115. *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 243 n.10, 430 P.2d 68, 75 n.10, 60 Cal. Rptr. 510, 517 n. 10 (1967).

This kind of reasonable care standard delineates the boundaries of all defendants' liability. The *Donnell* court should have left it to future courts to deal with the scope of the physical limits of control in the close cases.

The *Donnell* court essentially stated that its decision rested on the fine distinction between the "right to control" property and the "ability to influence or affect the condition of" that property, but it never explained what it saw as the difference in meaning between the two. The dictionary definitions of these terms are almost identical.<sup>116</sup> The court left a puzzling question unanswered: how will a landowner be able to distinguish between the terms? Because judicial decisions often influence public conduct with respect to avoiding liability, the *Donnell* court should not have based its decision on murky linguistic comparisons.<sup>117</sup>

Moreover, the court's definition of "control," which excludes the idea of ability to influence or affect the condition of property, departs from the California courts' long-standing interpretation of the word.<sup>118</sup> Courts have often been reluctant to extend liability to a defendant who lacks the ability to repair the dangerous condition.<sup>119</sup> By analogy, if the power to influence the condition of property has been established, as it was in *Donnell*, liability should follow. For example, in assessing liability between a landlord and a tenant, a court examines which party had the right to influence or control the dangerous locality.<sup>120</sup> As the court in *Low v. City of Sacramento*, stated:

---

116. See *supra* note 110.

117. "Given the wide ranging circumstances that may exist in cases involving landowners and occupiers and the analytical complexity in determining which setting justifies a protective duty, there is clearly a definite need for better guidance than that presently offered by the judiciary." Cabrera, *supra* note 90, at 185.

118. See, e.g., *Johnston v. De La Guerra Properties, Inc.*, 28 Cal. 2d 394, 401, 170 P.2d 5, 9 (1946) ("This evidence would support a finding and conclusion that Smith had a limited right of control over this portion of the premises and of the means of illuminating the entranceway . . .").

119. In *Nevarez v. Thriftmart, Inc.*, 7 Cal. App. 3d 799, 805, 87 Cal. Rptr. 50, 53 (1970), the court noted that the defendant supermarket could not be held liable for injuries occurring in a public street because the power to control public streets and regulate traffic lies with the state which may delegate local authority to municipalities.

120. *Low v. City of Sacramento*, 7 Cal. App. 3d 826, 832, 87 Cal. Rptr. 173, 175 (1970).

Although authority to remedy the dangerous condition is no longer an express statutory standard, the courts have continued to resort to it. Where control, rather than power to correct the defective condition, is the verbal signal of liability, the courts have continued to equate the two concepts. Thus, in identifying the defendant with whom control resides, location of the power to correct the dangerous condition is an aid.<sup>121</sup>

Interestingly, the definition of control above was used by both *Schwartz* and the modern line of cases which refused to adopt the *Schwartz* flexible concept of premises. One of the bases for the *Schwartz* court's decision was the vendor's ability to halt traffic to allow the child to cross safely and, thus, remedy the dangerous condition.<sup>122</sup> In *Nevarez*,<sup>123</sup> the court refused to recognize the defendant grocery store could be liable because "[t]he power to control public streets and regulate traffic lies with the state which may delegate local authority to municipalities."<sup>124</sup> The *Owens* court explained that the concept upon which all premises liability is based is the right to manage and control property, which justifies the imposition of a duty to exercise due care in the management of the property.<sup>125</sup> Clearly, California precedent establishes that liability is not justified unless the defendant had the power to prevent the injury.

The Donnell decision contains a more fundamental flaw by ignoring the consideration of the relevant policy factors in assessing the existence of a duty between the law school and its students.<sup>126</sup> Any judicial departure from the legislative principle expressed in California Civil Code section 1714,<sup>127</sup> requires an evaluation of the Rowland policy considerations:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the close-

---

121. *Id.* at 832, 87 Cal. Rptr. at 176.

122. *See supra* note 49 and accompanying text.

123. *Nevarez*, 7 Cal. App. 3d 799, 87 Cal. Rptr. 50 (1970).

124. *Id.* at 805, 87 Cal. Rptr. at 53.

125. *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 386, 243 Cal. Rptr. 627, 631 (1988).

126. The only policy consideration discussed by the court was the burden to the defendant. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 725, 246 Cal. Rptr. 199, 205 (1988).

127. CAL. CIV. CODE § 1714 (West 1985).

ness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.<sup>128</sup>

Possibly the court ignored the *Rowland* factors because their application to the facts of *Donnell* practically mandates the recognition of a duty.<sup>129</sup> The plaintiff alleged, and supported his allegations with proof, that the defendant had knowledge of other attacks in this location.<sup>130</sup> The plaintiff's allegations of injury were not disputed.<sup>131</sup> Common knowledge dictates that more muggings occur in dark places. Therefore, one could reasonably assume that the defendant's failure to install adequate lighting was connected to the plaintiff's injuries.<sup>132</sup> The policy of preventing future harm would be served by imposing liability on the defendant for not adequately protecting its students from injury is indisputable. As for the burden to the defendant, the safety measures could be installed at a low cost, and insurance is widely available for this type of injury.<sup>133</sup> In addition, because Cal Western is a private school, there was no public entity discretionary immunity to contend with.

As for the moral blame attached to the defendant's conduct, the dissenting judge summed it up best:

[I]t is perhaps an indictment of our litigation-minded society that a law school repeatedly rejected its employees' and students' requests for increased lighting and other security measures in the face of known risk of criminal assault because of nominal expense and the danger the school would be assuming liability if lights were installed.<sup>134</sup>

---

128. *Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

129. 200 Cal. App. 3d at 727, 246 Cal. Rptr. at 206 (Weiner, J., dissenting).

130. *Id.* at 727, 246 Cal. Rptr. at 206.

131. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 727, 246 Cal. Rptr. 199, 206 (1988) (Weiner, J., dissenting).

132. *Id.* at 727, 246 Cal. Rptr. at 206.

133. However, this coverage question would most likely be governed by the definition of "premises" in the particular policy.

134. *Donnell*, 200 Cal. App. 3d at 727, 246 Cal. Rptr. at 206 (Weiner, J., dis-



The *Donnell* court rewarded this inaction by refusing to hold the school liable "precisely because it did not assume responsibility over the city-owned sidewalk."<sup>135</sup> The court indulged Cal Western even though the school most likely could have prevented the attack by installing adequate lighting. The decision ignores the facts and fails to address the policy considerations required in the determination of the duty of care. The court disregarded the facts and policy considerations in favor of overzealous protection of the "predictability and reasonably clear limits" that "[t]he existing standard for premises liability" furnishes.<sup>136</sup> Unfortunately, the *Southland* decision did little to remedy the *Donnell* court's mistake.

B. *Southland*: A Missed Opportunity To Clarify The Definitions Of "Control" And "Premises"

The *Southland* court focused on certain of the real party's allegations in holding that petitioners' summary judgment motion had properly been denied.<sup>137</sup> Spencer asserted that inadequate parking in the petitioners' lot prompted customers to use the adjacent vacant lot.<sup>138</sup> Evidence existed indicating that the petitioners did nothing to discourage this use of the lot and, thus, at least passively encouraged it.<sup>139</sup> In addition, the petitioners had the non-exclusive right, granted in its lease, to use the vacant lot for customer parking and as an ingress and egress for its employees.<sup>140</sup> Referring back to the *Johnston* decision, the court reasoned that to the extent that greater parking capacity increased sales, the store realized a commercial benefit from the use of the lot.<sup>141</sup> Finally, evidence that the store and the surrounding area was a hang-out for local juveniles was known.<sup>142</sup> The store manager would frequently order loitering juveniles

---

sending).

135. *Id.* at 727, 246 Cal. Rptr. at 203.

136. *Id.* at 726, 246 Cal. Rptr. at 205.

137. *Southland v. Superior Court*, 203 Cal. App. 3d 656, 663, 250 Cal. Rptr. 57, 60 (1988).

138. *Id.* at 666-67, 250 Cal. Rptr. at 62.

139. *Id.* at 667, 250 Cal. Rptr. at 62.

140. *See supra* note 54 and accompanying text.

141. *Southland*, 203 Cal. App. 3d at 667, 250 Cal. Rptr. at 63.

142. *Id.* at 667, 250 Cal. Rptr. at 63.

to leave and would call the police to enforce this request.<sup>143</sup>

The petitioners' summary judgment motion was based on two arguments: 1) that they had no ownership, possession, or control over the vacant lot, and 2) that as a matter of law the injury was not foreseeable.<sup>144</sup> In reaching its decision, the *Southland* court cited the long-established rule that a business proprietor has a duty of care to prevent criminal attacks on invitees while they are on his premises.<sup>145</sup> The court outlined, but did not specifically apply, the *Rowland* policy considerations.<sup>146</sup> Finally, the court detailed the *Schwartz* definition of premises, and approved of the *Schwartz* court's recognition that, in defining the scope of premises, "the critical issue is control," but that "the exercise of control is not necessarily confined to those premises which are owned or possessed by the defendant."<sup>147</sup> The *Southland* court thus established that the existence of a business proprietor's duty of care to patrons injured by the criminal acts of third persons on adjacent premises would "depend upon the proprietor's actual or *apparent* control of the adjacent property . . . ." <sup>148</sup>

Clearly, the court accepted Spencer's argument that because the petitioners "had the power to control loitering on the lot by unsavory individuals,"<sup>149</sup> a triable issue of fact existed which was sufficient to bring the case to the jury: "Spencer asserts that a defendant 'may owe a duty to patrons "off the business premises" when circumstances causing the injury are within the range of the defendants' reasonable supervision and control.'" <sup>150</sup> Even though the *Southland*

---

143. *Id.* at 662, 250 Cal. Rptr. at 60.

144. *Id.* This two-staged argument was an attempt to establish that, in contrast to *Schwartz*, the injury here did not occur on the petitioner's premises, and, unlike *Isaacs*, even if it did occur on the petitioner's premises, the injury was not foreseeable.

145. *Id.* at 663, 250 Cal. Rptr. at 60 (quoting *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 807, 685 P.2d 1193, 1197, 205 Cal. Rptr. 842, 846 (1984)).

146. *Id.* at 664, 250 Cal. Rptr. at 60.

147. *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 239-40, 430 P.2d 68, 75, 60 Cal. Rptr. 510, 517 (1967).

148. *Southland v. Superior Court*, 203 Cal. App. 3d 656, 662, 250 Cal. Rptr. 57, 60 (1988).

149. *Id.* at 664, 250 Cal. Rptr. at 61.

150. *Id.* at 665, 250 Cal. Rptr. at 61.

court accepted the argument, rejected in *Donnell*, that the duty of care extended beyond the property line to all areas which Southland had the *power* to control, it did not disagree with the *Donnell* decision.<sup>151</sup> Rather, the court cited *Donnell*, *Steinmetz*, *Nevarez*, and *Owens* as examples of cases where,

it was clear that the defendant did not and could not exercise control over the property where plaintiff sustained injury. While the conduct of third persons might have been foreseeable, defendant's clear lack of control made it impossible to have instituted preventive measures. Thus, where the absence of control has been unequivocally established, no basis for finding a duty or imposing liability exists.<sup>152</sup>

The *Southland* court adopted the definition of control which equates control with the power to institute preventive measures, but failed to see that this existed in *Donnell* because the school had the ability to install lights on its building.

The *Southland* court's statement that the defendant in *Donnell* had a clear lack of control, making it impossible for the school to institute preventive measures, is inconsistent with the *Southland* court's analysis of the facts. If the *Southland* court accepted Spencer's argument that the petitioners' power to control the loitering on the adjacent lot was a sufficient basis for the finding of a duty of care, then how could it agree with the *Donnell* court's assertion that the school's ability to illuminate the adjacent sidewalk did not constitute control over the sidewalk? The *Southland* court's silence on this point, and its acceptance of the *Donnell* holding on the facts of that case, leaves the definition of control unclear.

Concededly, factors were present in the *Southland* case which were not in *Donnell*. The fact that in the past the store manager had endeavored to remove loitering juveniles from the store area was important. The court indicated that this exercise of control in the past was strong evidence of the petitioner's ability to institute preventive measures.<sup>153</sup> However, the court also indicated that the petitioner's power to affect the condition of the adjacent property was an indepen-

---

151. *Id.* at 666, 250 Cal. Rptr. at 62.

152. *Id.* at 665-66, 250 Cal. Rptr. at 62.

153. *Southland*, 203 Cal. App. 3d at 666-67, 250 Cal. Rptr. at 62-63.

dent basis for its decision.<sup>154</sup> This casts the reasoning of the *Southland* court in stark contrast to that of the *Donnell* court.

The important distinction between *Donnell* and *Southland* is that the *Southland* court recognized the importance of letting a jury resolve the issues of whether the defendant's owed a duty of care to the plaintiff and whether the defendant breached this duty. The *Donnell* court was all too willing to invade the province of the jury by narrowly defining what actions could constitute control over the adjacent property. This shows a severe lack of confidence in a jury's ability to assess liability using the reasonableness standard. In addition, the court's failure to consider the policy considerations underlying its decision leaves the impression that the response of the court was merely subjective. If so, the court failed to heed the *Schwartz* court's warning that "just as we may not rely upon our private judgment on this issue, so the trial court may not impose its private judgment upon a situation, such as this, in which reasonable minds may differ."<sup>155</sup>

#### IV. PROPOSAL: INJECT A REASONABLE MAN STANDARD INTO THE *SCHWARTZ* DEFINITION OF PREMISES

Courts should utilize the *Schwartz* definition of premises in assessing liability for injury on land. As the *Southland* court recognized, the importance of the *Schwartz* decision is its recognition of a landowner's ability to affect the condition of land which he does not own or possess.<sup>156</sup> In order to adequately compensate the victims of violent crime, all those who had the reasonable ability to remedy a dangerous condition on land, but failed to so remedy, should be held liable.

The *Donnell* court was not entirely correct when it stated:

The existing standard for premises liability, based on ownership, possession or control, provides predictability and reasonably clear limits. Such limits on premises liability are also consistent with the general policy underlying much of tort law. Although persons may be liable

---

154. *Id.* at 669, 250 Cal. Rptr. at 64.

155. *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 244, 430 P.2d 68, 76, 60 Cal. Rptr. 510, 518 (1967).

156. *Southland*, 203 Cal. App. 3d at 665 n.6, 250 Cal. Rptr. at 61 n.6.

for injuries occurring under various circumstances on property under their control or for actively putting others in peril elsewhere, absent specific statutory requirements persons generally have no duty (and indeed often no right) to attempt to prevent any possible injury which may occur on another's property.<sup>157</sup>

If the *Donnell* court's version of control were modified to include a landowner's *ability* to influence the condition of land, this would then be an accurate statement. Only then would the standard for premises liability provide predictability and clear limits. Currently, however, a landowner could not be expected to know which areas of adjacent land for which he could be held responsible.

As one court has recognized, one who possesses the power to act should have a duty "to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated."<sup>158</sup> In imposing this duty to act, a court should look to the following three factors:

- 1) The degree of power and control the landowner has over the welfare of his business invitees. The inquiry would focus on the landowner's ability to remedy the dangerous condition of adjacent property and be limited by the traditional reasonableness standard of tort law.

- 2) The extent to which the business invitee has surrendered himself to the proprietor's protection. This considers whether the proprietor holds the only means of remedying the dangerous condition, as in *Southland*, or whether the means of protection are jointly held by the invitee and the proprietor.

- 3) Whether the injury was foreseeable. In considering this factor, the court should utilize the *Isaacs* test of foreseeability<sup>159</sup> in order to bring the assessment of liability for injury from criminal acts of third parties on *adjacent* property into line with the assessment of liability for injury from criminal acts within the landowner's property line.

---

157. *Donnell v. Western California School of Law*, 200 Cal. App. 3d 715, 726, 246 Cal. Rptr. 199, 205 (1988).

158. *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970).

159. *Isaacs v. Huntington Memorial Hosp.*, 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

In addition, the court should apply the *Rowland* policy considerations to the facts of each case to determine whether a duty of care exists between a landowner and business invitee. If all courts used these standards to assess liability for injury from the criminal acts of third parties on adjacent property, this area of tort law would be uniform and predictable. Business landowners would have a clear indication of the scope of their duty to invitees. At the same time, the victims of violent crime would have adequate compensation from those who contributed to their injuries. Finally, the area of premises liability would align itself with the legislative policy expressed in California Civil Code section 1714, which states in pertinent part that "everyone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ." <sup>160</sup>

#### V. CONCLUSION

The current state of premises liability for injuries from the criminal acts of third parties on adjacent land remains unresolved in California. Certain courts have used the *Schwartz* definition of premises to extend liability to all areas over which the landowner has control.<sup>161</sup> However, even those decisions which use this definition of premises have been vague in further defining the meaning of "control."<sup>162</sup> As a result, ambiguities remain with regard to the circumstances in which a landowner may be held liable for injuries to his business invitees from criminal attacks on adjacent property.

This uncertainty would be resolved if courts considering the question of landowner liability apply a standard definition of premises. This definition should be a product of the *Schwartz* definition of premises<sup>163</sup> and the *Donnell* dissent's definition of control.<sup>164</sup> The court's use of this definition in

---

160. CAL. CIV. CODE § 1714 (West 1985).

161. *Southland v. Superior Court*, 203 Cal. App. 3d 656, 250 Cal. Rptr. 57 (1988).

162. *Id.* at 665, 250 Cal. Rptr. at 61.

163. *Schwartz v. Helms Bakery Ltd.*, 67 Cal. 2d 232, 239, 430 P.2d 68, 72-73, 60 Cal. Rptr. 510, 514-15 (1967).

164. *Donnell v. California Western School of Law*, 200 Cal. App. 3d 715, 727, 246 Cal. Rptr. 199, 221 (Weiner, J., dissenting).

assessing liability would ensure that landowners are held responsible for all areas which they have the reasonable ability to influence or affect. Only then will the ambiguous approach used in the past by the California courts in assessing premises liability be remedied.

*Margaret J. Hurley*